

United States Court of Appeals For the First Circuit

No. 11-1675

SAMUEL BARTLEY STEELE

Plaintiff - Appellant

v.

ANTHONY RICIGLIANO; BOSTON RED SOX BASEBALL CLUB LIMITED PARTNERSHIP; BRETT LANGEFELS; JOHN BONGIOVI, individually and, d/b/a Bon Jovi Publishing; JOHN W. HENRY; MAJOR LEAGUE BASEBALL PROPERTIES, INC., a/k/a Major League Baseball Productions; RICHARD SAMBORA, individually and, d/b/a Aggressive Music; TIME WARNER, INC.; TURNER SPORTS INC.; TURNER STUDIOS INC.; VECTOR MANAGEMENT LLC, a/k/a Successor in Interest to Vector Management; WILLIAM FALCON, individually and, d/b/a Pretty Blue Songs; BOB BOWMAN; CRAIG BARRY; DONATO MUSIC SERVICES, INC.; FENWAY SPORTS GROUP, a/k/a FSG, f/k/a New England Sports Enterprises LLC; JACK ROVNER; JAY ROURKE; LAWRENCE LUCCHINO; MAJOR LEAGUE BASEBALL ADVANCED MEDIA, L.P.; MARK SHIMMEL, individually and, d/b/a Mark Shimmel Music; MIKE DEE; NEW ENGLAND SPORTS ENTERPRISES, LLC, f/d/b/a Fenway Sports Group, a/k/a FSG; SAM KENNEDY; THOMAS C. WERNER; TURNER BROADCASTING SYSTEM, INC.

Defendants – Appellees

ON APPEAL FROM THE U.S. DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

PETITION FOR PANEL REHEARING AND REHEARING EN BANC OF
APPELLANT SAMUEL BARTLEY STEELE

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STATEMENT PURSUANT TO FED. R. APP. P. 35(b)

The Panel's February 10, 2012 Judgment ("Judgment") affirmed, without analysis or discussion, the district court's fraudulently obtained, legally untenable, and factually erroneous decision; the Judgment – by summarily affirming the district court without addressing the dispositive issues, supported by undisputed facts, and the district court's failure to address or adjudicate those issues and facts - conflicts with Supreme Court and First Circuit decisions regarding the First Circuit's powers and supervisory duties to ensure the integrity of judicial process in the district courts. New Hampshire v. Maine, 532 U.S. 742 (2001); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944); Alternative System Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23 (1st Cir. 2004); Aoude v. Mobil Oil Corp., 892 F.2d 1115 (1st Cir. 1989).

Additionally, the Judgment does not address that defendants conceded all facts in plaintiff's favor as to each issue on appeal; that Supreme Court and First Circuit decisions as applied to those facts leave no discretion to affirm and rather require reversal; and that the district court abused its discretion by failing to adjudicate the dispositive facts and law. McKinnon v. Kwong Wah Restaurant, 83 F.3d 498 (1st Cir.

1996) (ignoring “material factor deserving significant weight” is abuse of district court’s discretion).

The net result is disturbing precedent in conflict with Supreme Court and First Circuit decisions, to wit:

1. Judicial estoppel may be ignored entirely by the district court and the First Circuit where it is conclusively shown that the plaintiff not only satisfied each element of the doctrine, but that the undisputed facts proving each element also prove fraud on the court as to defendants’ first position and defendants’ second position, in conflict with Supreme Court and First Circuit precedent. New Hampshire, 532 U.S. 742; Alternative System, 374 F.3d at 31 (part of judicial estoppel analysis involves “subjective element,” specifically “[d]etermining whether a litigant is playing fast and loose with the courts”]; Hazel-Atlas Glass Co., 322 U.S. 238; Aoude, 892 F.2d 1115.

The district court’s paucity of findings as to judicial estoppel – its decision does not even say the words – should have led to *de novo* review by the First Circuit. Indigo America, Inc. v. Big Impressions, LLC, 597 F.3d 1, 3 (1st Cir. 2010). The Judgment, however, is also silent as to judicial estoppel.

2. Defendants' fraud on the court during the district court proceedings underlying this appeal does not merit correction, or even attention, in conflict with Supreme Court and First Circuit precedent. Hazel-Atlas Glass Co. 322 U.S. 238; Aoude 892 F.2d 1115.

3. Defendants' fraudulently obtained judgment in plaintiff's original copyright case (Appeal No. 09-2571) has preclusive power, in conflict with Supreme Court and First Circuit precedent. Hazel-Atlas Glass, 322 U.S. at 244-245; George P. Reintjes Co., Inc. v. Riley Stoker Corp., 71 F.3d 44, 47-48 (1st Cir. 1995) (discussion of jurisprudence of fraud on the court, holding that the old English rule whereby relief from judgment may be set aside due to after-discovered fraud regardless of the term of its entry should be applied where fraud is "deemed sufficiently gross" to depart from a "rigid adherence to finality") (citing Hazel-Atlas Glass, 322 U.S. 238) (internal quotations omitted).

4. That a district court and the First Circuit may selectively ignore a years-long scheme of fraud and misconduct and may reward the fruit of such fraud and misconduct by giving it preclusive effect.

OVERLOOKED AND MISAPPREHENDED FACTS AND LAW

1. Misapplication of Equitable Doctrines

a. Claim Preclusion

The Judgment endorses the district court's claim preclusion finding that plaintiff could have, but did not allege infringing reproduction in his original copyright case. The Judgment overlooks that plaintiff did claim infringing reproduction – as a legal claim and in his factual allegations of digital duplication - in his original copyright case. The district court in that case – at defendants' suggestion – ordered that all discovery and argument on the (otherwise dispositive) evidence of unlawful reproduction (i.e., de-facto digital copying), be excluded. The district court's order departed from First Circuit precedent, foregoing the First Circuit's two-part test for copyright infringement, when it bypassed the requisite 'probative similarity' analysis, and moved directly to the second, 'substantial similarity,' analysis.

Johnson v. Gordon, 409 F.3d 12 (1st Cir.).¹

¹ The district court's decision – to bypass the “probative similarity” analysis mandated by First Circuit law – was a legal error and is further addressed in plaintiff's related appeal (No. 09-2571) and his forthcoming petition for rehearing thereof.

The Judgment therefore misapprehends the First Circuit’s equitable application of claim preclusion insofar as the district court in the plaintiff’s first case forbade plaintiff from litigating his claim of infringing reproduction, and then in the second case held plaintiff could and should have litigated his claim in the first case. Airframe Sys. Inc. v. Raytheon Co., 601 F.3d 9 (1st Cir. 2010).

The Judgment acts as a “double-bar” to plaintiff’s right to have his claim heard – not heard twice, which would properly be subject to claim preclusion - but heard *at all*. It is not the law in the First Circuit, a fair application of the equitable doctrine of claim preclusion, or logically consistent, to forbid litigation of a claim and later hold that the claim could have been litigated.

b. Judicial Estoppel

The Judgment affirms the district court’s decision despite the latter’s failure to address a second and, here, inseparable equitable doctrine: judicial estoppel. Defendants were – as acknowledged in the district court’s decision subject to this appeal – responsible for the district court’s decision and order excluding discovery and argument on probative similarity, that is, evidence of defendants infringing reproduction, in plaintiff’s original infringement case. Specifically, defendants set

forth the argument – contrary to established First Circuit precedent - that determination of actual copying, i.e., “probative similarity,” was not required in plaintiff’s original copyright case. Defendants successfully argued that “no amount of copying,” if proved, could resolve plaintiff’s claim, despite that ‘factual copying,’ i.e., reproduction by digital duplication, was the threshold - and likely dispositive - issue in plaintiff’s initial infringement case.² The district court adopted defendants’ reasoning and issued an order forbidding discovery and argument on probative similarity and, accordingly, infringing reproduction.

Plaintiff’s primary reason for bringing the suit underlying this appeal was because his claim of infringing reproduction was never heard – was, in fact, summarily and improperly excluded from consideration altogether, contrary to First Circuit precedent – in his original infringement case.

Defendants’ claim preclusion argument above – adopted by the district court and now endorsed by the Panel – is the epitome of the injustice judicial estoppel was

² A finding of synchronization (an extension of the exclusive right of ‘reproduction’) or ‘actual copying’ of plaintiff’s copyrighted digital file – by email, file transfer, digital download, etc. – would have been dispositive of copyright infringement in violation of 17 U.S.C. § 106(1). Agee v. Paramount Comm., 59 F.3d 317, 322 (2nd Cir. 1995); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001).

created to address, that is, judicial manipulation, a “bait and switch” tactic whereby defendants in different proceedings take flatly inconsistent positions based solely on their changing interests. Patriot Cinemas v. General Cinemas, Inc., 834 F.2d 208 (1st Cir. 1987).

The Judgment’s failure – following defendants’ and the district court’s – to even utter the words “judicial estoppel” overlooks entirely the undisputed facts of defendants’ gaming of the judicial system that judicial estoppel seeks to prevent.

Worse, the failure to address this equitable doctrine in the context of adjudicating a case based on another equitable doctrine - claim preclusion – while simultaneously overlooking a third equitable doctrine – fraud on the court – where all three, on the undisputed facts of record, are inextricably linked, was overly narrow, improperly selective, and against the weight of (in fact against *all* of) the evidence.

The district court’s reasoning (endorsed by the Judgment) was illogical, contrary to First Circuit precedent, and unjust – grossly inequitable - in the extreme. The inequity comes sharper into focus in examining defendants’ fraud on the court, which began in 2008 during plaintiff’s original *pro se* infringement proceedings and continues through this appeal and beyond.

c. Fraud on the Court

The Judgment's imprimatur of the district court's decision overlooks "a deliberately planned and carefully executed scheme by an attorney to defraud" not only the district court, "but the Circuit Court of Appeals." George P. Reintjes Co., 71 F.3d at 47 (quoting Hazel-Atlas Glass, 322 U.S. at 245-246).

Plaintiff presented the district court with undisputed, unchallenged, and meticulously-documented facts, controlling Supreme Court and First Circuit decisions, and irrefutable arguments that showed, without reservation or doubt, defendants' and counsel's "scheme" to defraud the court. Id.

The district court failed to address, much less take corrective action in response to, defendants' proven fraud on the court at a level – though hard to believe – that is beyond all doubt more egregious than any of the controlling case law. This omission alone was reversible error. Hazel-Atlas Glass Co. 322 U.S. 238; Aoude, 892 F.2d 1115.

Defendants' fraud on the court in plaintiff's original infringement case from which the prior judgment held to preclude plaintiff in this case, has been extensively briefed in all four of plaintiff's appeals to this court (Nos. 09-2571; 10-2173; 11-

1674; 11-1675). Defendants' fraud on the court and misconduct towards opposing counsel during the district court proceedings in this case were also extensively briefed in this appeal.

On appeal defendants failed, as they had in district court, to dispute a single fact of their fraud on the court. Further, defendants misrepresented to this Court that the district court had "considered" the issue of defendants' fraud on the court and "summarily disposed" of it. In fact, the district court had explicitly stated that fraud on the court during plaintiff's original infringement case "will not be addressed here" and that "the Court declines to consider" fraud on the court during the proceedings below in this case.

Defendants' failure to refute their scheme, their silence in the face of such grave allegations - having been repeatedly 'caught-out' by inarguable facts of their own making - is compelling. The district court's sufferance of defendants' conduct is disquieting. However, the supervisory authority - and duty - of the Circuit Court, initiated by proper appellate process, would justly afford plaintiff some relief or, at a minimum, an explanation of why the district court had the discretion to overlook conclusive evidence of fraud on the court.

That the Panel affirmed the district court's unexplained – and inexplicable - passivity as to its own defrauding, and did not deem the issue worthy of discussion or analysis in a written decision appears to be a fundamental departure from the First Circuit's customary intolerance of fraud on its courts, against which the Court has previously taken measured – but decisive - action.

Rules 35 and 40 are clear that a petition for rehearing is not a second chance to argue plaintiff's appeal. However, because the Judgment offers no reasoning of its own, but rather general approval of the district court's decision, plaintiff reviews select undisputed facts from this and plaintiff's related cases as they pertain to unchallenged – yet unadjudicated – fraud on the court:

1. The primary defendant – the claimed copyright holder of the infringing work - in plaintiff's original infringement lawsuit defaulted willfully and surreptitiously; defendants took affirmative and improper steps to conceal its default;

2. Defendants deleted the primary defendant's name, copyright notice, and protectable material relevant to a substantial similarity analysis from the primary evidence – the infringing work - misattributed its ownership to other defendants, and misrepresented the legal status and ownership of the work;

3. Counsel filed this altered evidence repeatedly under oath as a “true and correct copy” of the infringing work, yet - after being ‘caught out’ on their alterations - conceded that it was merely a “version;” defendants have yet to explain or correct their alterations;

4. The primary evidence was deleted from its website during litigation, despite plaintiff’s preservation letters; an altered version later appeared, from which the primary defendant’s name, copyright notice, and protectable material had been deleted;

5. To further conceal the default of the primary defendant, an unserved, unrelated, similarly-named entity – who had actively evaded service by a U.S. Marshal – appeared, falsely claiming that *it* was the primary defendant;

6. A second defendant willfully and surreptitiously defaulted in plaintiff’s original infringement case, in identical manner as the primary defendant, above; an unserved, similarly-named entity, which plaintiff had not sued or ever heard of, filed a fraudulent appearance and falsely claimed to be the second willfully defaulting defendant; this ‘proxy’ defendant additionally misrepresented *itself*, using a false name in its appearance and all subsequent filings;

7. The primary defendant and several other defendants have filed numerous contradictory, false, and yet-uncorrected corporate disclosure statements as part of their larger scheme to conceal the willfully defaulting defendants;

8. In the case underlying this appeal, a primary defendant defaulted, willfully and surreptitiously, again in similar fashion to defendants' willful defaults above; to conceal its default, a discrete, similarly-named entity filed a false appearance claiming that the defaulting defendant was its "d/b/a;" this was an attempt – unsuccessful - to hide the defaulting defendant by claiming it did not exist as a distinct entity;

9. The false appearance and willful default above was accompanied by false filings, including an exhibit chart that misidentified several defendants, in direct conflict with defendants' previous court filings, in order to further conceal the willful default, and three dissonant corporate disclosure statements, the last of which directly conflicted with a subsequent disclosure to this Court;

10. The defaulting party was notified and – after filing its months-late appearance – deleted its website, publicly 'retired', rebranded, and restructured its ownership, but failed to update its corporate disclosure statements to this Court.

Plaintiff respectfully submits that this Court cannot overlook the above facts – and the numerous additional facts raised in plaintiff's appellate briefs - consistent with its duties and powers under Hazel-Atlas Glass and Aoude.

CONCLUSION

For the reasons stated above, the Judgment conflicts with Supreme Court and First Circuit precedent on an issue of exceptional importance, and overlooks and misapprehends material facts and law. Plaintiff respectfully requests a rehearing by the Panel and a rehearing *en banc*.

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Dated: February 22, 2012

CERTIFICATE OF SERVICE

I, Christopher A.D. Hunt, hereby certify that on February 22, 2012, I caused this Petition for Panel Rehearing and Rehearing En Banc of Appellant Samuel Bartley Steele, filed through the ECF system, to be served electronically by the Notice of Docket Activity upon the ECF filers listed below.

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United States Court of Appeals For the First Circuit

No. 11-1675

SAMUEL BARTLEY STEELE

Plaintiff - Appellant

v.

ANTHONY RICIGLIANO, ET AL.

Defendants - Appellees

Before

Boudin, Howard and Thompson,
Circuit Judges.

JUDGMENT

Entered: February 10, 2012

Plaintiff-Appellant Samuel Bartley Steele ("Steele") appeals from the judgment of the district court dismissing his claims on the basis of claim and issue preclusion and awarding sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure.

After our own careful review of the record and the briefs of the parties, we affirm the dismissal of all claims, for substantially the reasons set forth in the district court's thorough memorandum and order dated May 18, 2011. Further, we discern no error or abuse of discretion in the district court's orders concerning costs and sanctions. The judgment of the district court is affirmed in all respects.

By the Court:

/s/ Margaret Carter, Clerk

cc:

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